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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN FRANCISCO GONZALEZ, Defendant and Appellant.	H045206 (Monterey County Super. Ct. No. SS152175A)

A jury convicted defendant Juan Francisco Gonzalez of eight sexual abuse crimes against multiple child victims, including three counts of lewd acts on a child under the age of 14 (Pen. Code, § 288, subd. (a);[1] counts 1, 9, and 10) and five counts of continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a); counts 3, 4, 5, 6, and 7). The jury also found true a multiple-victim allegation for each count of conviction (§ 667.61, subds. (b) & (e)(4)).

Gonzalez contends that we must reverse his convictions for continuous sexual abuse of a child on counts 3 and 4 because of insufficient evidence. In addition, he argues that the judgment should be reversed because child sexual abuse accommodation syndrome (CSAAS) evidence should not have been admitted, and the trial court

[1] All further statutory references are to the Penal Code unless otherwise indicated.

erroneously instructed the jury using CALCRIM No. 1193, which allowed the jury to consider the CSAAS evidence to determine the credibility of the complaining witnesses.

We agree that there is insufficient evidence supporting Gonzalez's conviction of continuous sexual abuse as charged in count 3 because the evidence did not reasonably support a finding that the proscribed acts occurred over a period of at least three months. Nevertheless, we conclude that the evidence presented at trial was sufficient to prove the lesser included offense of lewd acts on a child under the age of 14. (§ 288, subd. (a).) Accordingly, we modify count 3 to the lesser offense and remand for resentencing on all counts. We reject Gonzalez's other contentions.

I. FACTS AND PROCEDURAL BACKGROUND

A. *Procedural History*

Gonzalez was charged by information with ten counts alleging he committed sex crimes against seven child victims, identified as Jane Does 1 through 7. Counts 1, 9, and 10 alleged that Gonzalez committed a lewd and lascivious act on Jane Doe 1, a child under 14 (count 1), and Jane Doe 7, also a child under age 14 (counts 9 and 10) (§ 288, subd. (a)). Count 2 alleged that Gonzalez engaged in sexual intercourse or sodomy with Jane Doe 2, a child who was 10 years of age or younger (§ 288.7, subd. (a)). Counts 3, 4, 5, 6, and 7 alleged that Gonzalez committed continuous sexual abuse of Jane Does 2, 3, 4, 5, and 6, respectively, all children under age 14 (§ 288.5, subd. (a)). Count 8 alleged that Gonzalez engaged in oral copulation or sexual penetration with Jane Doe 7, a child who was 10 years of age or younger (§ 288.7, subd. (a)). The information also alleged a multiple-victim enhancement for each count (§ 667.61, subds. (b) & (e)(4)).

Gonzalez was tried before a jury in September 2017. After the evidence was presented, the prosecutor moved under section 1385 to dismiss count 8 and the attendant enhancement. The jury was unable to reach a verdict on count 2, which resulted in a

mistrial on that count.[2] The jury found Gonzalez guilty of the remaining counts and found true the enhancements.

The trial court sentenced Gonzalez to consecutive terms of 25 years to life for counts 1, 3, 4, 5, 6, 7, and 9, based on the multiple-victim enhancement on each count. (§§ 667.6, subd. (d); 669; 667.61, subd. (j)(2).) The trial court imposed a concurrent term of 25 years to life on count 10, which involved the same victim as count 9. (§§ 669; 667.61, subd. (j)(2).) In addition, the trial court imposed fines, fees, and victim restitution.

B. *The Evidence Presented at Trial*

The prosecution presented evidence that Gonzalez sexually abused children over several years. The young female victims lived in or visited Gonzalez's house, and some were members of Gonzalez's extended family.[3]

1. The Prosecution Evidence Regarding Jane Doe 2

Jane Doe 2 was born in June 2006. At the time of trial (September 2017), she was in the sixth grade. Gonzalez's wife Martha was Jane Doe 2's maternal aunt. Jane Doe 2 went to Gonzalez's house every day to play with her cousins. Her mother would bring her there before school, and Martha would take her and Gonzalez's son B.G.[4] to school.[5]

When Jane Doe 2 was in third grade (i.e., during the 2014-2015 school year), "something [she] didn't like happened at that house." Jane Doe 2 remembered that the

[2] The record on appeal does not indicate a final disposition of count 2.

[3] Because Gonzalez challenges the sufficiency of the evidence as to count 3 (relating to Jane Doe 2) and count 4 (relating to Jane Doe 3), we discuss the evidence regarding those counts in detail. We summarize the remaining evidence.

[4] We refer to this witness, who is a minor, by his initials to protect his privacy interests. (Cal. Rules of Court, rule 8.90(b)(9).)

[5] Jane Doe 2's testimony about being present at the Gonzalez home every day before school was contradicted by her mother, who testified that she did not drop Jane Doe 2 off at the house in the morning. Rather, Jane Doe 2's mother said her daughter sometimes went to Gonzalez's house after school, and she was dropped off at Gonzalez's house on Sundays.

first time Gonzalez touched her she was in B.G.'s room and Gonzalez touched her "private part" (i.e., her genitalia)[6] with his hand over her clothes. Jane Doe 2 also recalled another incident that occurred when she was in the third grade during which Gonzalez "put his private part in [her] butt." This incident happened on a weekend when Jane Doe 2, B.G., and Gonzalez were in a bed in B.G.'s room. The covers were over Jane Doe 2 and Gonzalez; B.G. was playing video games. Jane Doe 2 was wearing shorts and a shirt, and Gonzalez pulled her shorts down close to her knees. She then "scooted away" toward B.G., but Gonzalez tried to pull her back by grabbing her head and pulling.

Jane Doe 2 testified that she had been touched previously on her private parts "eight other times" in that room. She admitted she was only guessing as to the number, but said that it was definitely more than five times. She subsequently said on cross-examination that she was not sure how many times Gonzalez touched her, but it definitely was more than once. During redirect examination, Jane Doe 2 said Gonzalez touched her private parts more than three times. On these occasions, Gonzalez touched the outside of her genitalia, skin to skin, with his hands under her clothing while they were both fully clothed. Gonzalez also touched her chest one time. Jane Doe 2 recalled pushing Gonzalez's hand away when he touched her; this happened when she was in the third grade.[7]

Jane Doe 2 told her best friend and her mother about Gonzalez's acts. Jane Doe 2's mother recorded part of the conversation she had with her daughter. Jane Doe 2 told her mother that Gonzalez put his private part in her buttocks one time and touched her private part with his hand many times.

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[6] Jane Doe 2 answered affirmatively when asked if her "private" was "where you go pee."

[7] Jane Doe 5 recalled seeing Gonzalez touch Jane Doe 2 on her buttocks over her clothing.

2. The Prosecution Evidence Regarding Jane Doe 3

Jane Doe 3 was born in April 2008. At the time of trial, she was nine years old and in the fourth grade. Gonzalez was Jane Doe 3's uncle and she called him "dad," because he was like a father to her after her father died.[8] Jane Doe 3 lived in the Gonzalez house from 2008 until 2015.

At trial, Jane Doe 3 denied that Gonzalez ever touched her in a sexual manner. Jane Doe 3 acknowledged that she had told her mother that Gonzalez touched her, but she said the touching comprised frequent hugs with his hands and arms around her hips. Jane Doe 3 and her mother moved out of the Gonzalez house because Jane Doe 3 told her mother that Gonzalez touched her. At the time she disclosed the touching, Jane Doe 3 thought Gonzalez's hugs were a "bad touch" because she did not like hugs. She denied having told her mother that Gonzalez touched her "cucaracha" (i.e., her genitalia)[9] or that he grabbed her breasts.

Jane Doe 3's mother Ana testified that, in 2014, Jane Doe 3 said that Gonzalez would take her into her bedroom to "pretend that they were boyfriend and girlfriend." Jane Doe 3 told her mother that Gonzalez hugged her and touched her breasts, legs, vagina, and buttocks. Ana confronted Gonzalez about Jane Doe 3's statement, and he denied engaging in that behavior. Ana told Gonzalez never to hug or touch Jane Doe 3 again. Jane Doe 3 and Ana continued to live in the Gonzalez house. Ana told Jane Doe 3 that if the touching ever happened again, she was to tell Ana immediately. Jane Doe 3 never reported another incident to Ana.

In June 2015, after Jane Doe 1 made a separate accusation against Gonzalez, Ana again asked Jane Doe 3 what happened between her and Gonzalez. Jane Doe 3 confirmed the acts she had previously disclosed in 2014. Ana recorded this conversation

[8] Gonzalez's wife Martha was a sister of the ex-husband of Jane Doe 3's mother.

[9] Jane Doe 3 said that she called her "private parts" "cucaracha." She also marked an exhibit to indicate the location of her "cucaracha."

on her phone and gave the recording to police. Subsequently, Jane Doe 3 was interviewed forensically by a trained interviewer at a private entity designated by the county to conduct interviews of children regarding sexual assault. Jane Doe 3 was seven years old at the time of her interview. The interview was recorded, and the recording was played for the jury and admitted into evidence.

In the interview, Jane Doe 3 said Gonzalez "always takes [her] to his room and turn[s] off the light." She said that Gonzalez is "nasty" and "does that to my . . . cousins, too." When asked what Gonzalez did to be "nasty," Jane Doe 3 said, "I don't remember because it was a long time ago. I was six." She later said Gonzalez touched her leg and feet with his hand when she was in his bed. Gonzalez touched her over her clothes. Jane Doe 3 said she recalled Gonzalez touching her once but did not remember how many times he touched her. However, she then said Gonzalez touched her legs and "where I go pee" (i.e., her genitalia) with his hand and sometimes touched her with his "huevos" (i.e., his genitalia).[10] She saw Gonzalez touch his genitalia and saw his genitalia when he took off his pants. Gonzalez also touched her buttocks with his hand and genitalia. Jane Doe 3 did not remember when Gonzalez first touched her. When asked to describe the last time Gonzalez touched her, Jane Doe 3 said, "I don't remember nothing." She then reiterated that Gonzalez used to touch her with his hand, and "one time he touched [her] with his huevos" on her genitalia over her clothing and she said "no, Tio." Gonzalez sometimes took off her clothes, but she only remembered one time that he took off her clothes, leaving on her shirt and underwear and touching her leg and genitalia with his genitalia. Gonzalez touched her genitalia over and under her clothing on different days. Jane Doe 3 said the touching happened when she was "six . . . or five, I don't remember." Gonzalez touched her with his genitalia skin-to-skin only on her buttocks; she did not remember how many times he touched her on her back with his genitalia. Gonzalez

[10] Jane Doe 3 said the part of a boy's body used to "do pee" is his "huevos."

touched Jane Doe 3 with his hand "[a] lot." Jane Doe 3 said Gonzalez's touching with his genitalia on her back occurred when she was in kindergarten and first grade, and "[i]t was a long time ago."

In addition, Jane Doe 4 and Jane Doe 6 recalled seeing Gonzalez touch Jane Doe 3. Jane Doe 4 witnessed Gonzalez do an "exercise" with Jane Doe 3, which involved Gonzalez holding Jane Doe 3's ankles while she lay on a bed on her back and positioning his penis close to her buttocks. These "exercises" happened a few times. Jane Doe 6 saw Gonzalez touch Jane Doe 3's buttocks and vagina with his hand.

3. The Prosecution Evidence Regarding the Other Jane Does

Jane Does 1, 4, 5, 6, and 7 testified that Gonzalez had touched them in ways similar to the acts described by Jane Does 2 and 3. For example, Jane Doe 4 testified that, when she was nine or ten years old, Gonzalez touched her while she was sitting on a couch. He sat down next to her and slowly started to rub her thigh and then touched her "flower" (i.e., her vagina) up and down over her clothing. Gonzalez touched Jane Doe 4 "[a] lot of times" after this first incident. Jane Doe 4 told Gonzalez's son B.G. and Jane Doe 3 about Gonzalez's behavior, but she did not tell any adult until 2015, when her mother asked if Gonzalez touched her. Jane Doe 4 was afraid and thought Gonzalez would threaten her. Similarly, Jane Doe 6 lived in the Gonzalez household, and Gonzalez's molestation of her began when she was around nine years old. Among other incidents, Gonzalez touched Jane Doe 6's vagina and chest when they were in his bedroom. Gonzalez exposed his penis, held it in his hands, and asked Jane Doe 6 to touch it more than five times. Jane Doe 6 did not tell anyone about Gonzalez's actions because he told her not to tell on him and cause him trouble. She also was afraid Gonzalez might do something to her, her sister, or her father. Jane Doe 6 disclosed Gonzalez's behavior for the first time at her forensic interview in 2015, after her sister told their father that Gonzalez touched her.

4. Additional Prosecution Evidence

Gonzalez left his house and never returned after the allegations against him came to light in June 2015. He traveled to Los Angeles a couple days later and then to El Salvador. Gonzalez was arrested in January 2016, after he returned to Los Angeles.

A licensed psychologist, Anthony Urquiza, testified for the prosecution as an expert on child sexual abuse accommodation syndrome (CSAAS). Dr. Urquiza did not meet with any of the victims in the case. Dr. Urquiza described and explained for the jury the five parts of CSAAS: secrecy; helplessness; entrapment and accommodation; delayed and unconvincing disclosure; and retraction or recantation. He testified that the overall premise of secrecy is that most children do not talk about being sexually abused, or at least they do not talk right away; it takes time before they disclose the abuse. Delayed disclosure relates to secrecy; disclosure by the abuse victim may not occur for months or years. Research demonstrates that about three-quarters of abuse victims failed to disclose their abuse in the first 12 months after it occurred. Although some children disclose abuse soon after it occurs, most children exhibit a significant delay in disclosure. Roughly one-third of child abuse victims do not disclose until they are over age 18. Retraction of an allegation of abuse sometimes occurs. Roughly 20 to 25 percent of children who report sexual abuse to authorities retract their allegation. The "best predictor" of retraction is familial pressure on the child; for example, telling the child that the problems that resulted from the disclosure will be resolved if the disclosure is retracted. In addition to describing CSAAS, Dr. Urquiza testified about issues related to and circumstances that affect a child's ability to recall and accurately relate details of abuse.

5. Defense Evidence

Gonzalez presented testimony from former coworkers, a former housemate, and relatives.

Gonzalez was away from his house during weekdays from approximately 7:45 a.m. to 5:00 p.m., and he typically worked three or four Saturdays per month. Family and friends frequently visited and gathered at the Gonzalez house. Gonzalez often rested in his room. Gonzalez's witnesses did not see him act inappropriately with children.

II. DISCUSSION

Gonzalez raises three claims on appeal. He argues that we must reverse his convictions for continuous sexual abuse of Jane Does 2 and 3 (counts 3 and 4, respectively) because the evidence was insufficient as to the required elements that he committed three or more acts of lewd conduct on each girl over a period of more than three months. He also contends that the judgment should be reversed because the child sexual abuse accommodation syndrome evidence should not have been admitted, and the trial court prejudicially erred by instructing the jury with CALCRIM No. 1193. For the reasons stated below, we conclude that there was insufficient evidence to sustain the conviction for continuous sexual abuse of Jane Doe 2. We reject Gonzalez's other contentions.

A. *Sufficiency of the Evidence Regarding Jane Does 2 and 3*

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Powell* (2018) 5 Cal.5th 921, 944, citation and internal quotation marks omitted.) A reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"An appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) "Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it." (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1765.)

Section 288.5, subdivision (a), states in relevant part: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in . . . three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child. . . ." "Section 288.5 relates to 'continuous sexual abuse' and accordingly requires at least three acts of sexual misconduct with the child victim over at least three months to qualify for prosecution of persons who are either residing with, or have 'recurring access' to, the child." (*People v. Rodriguez* (2002) 28 Cal.4th 543, 550.) In other words, the prosecution must prove that the defendant committed at least three lewd or lascivious acts on a child under the age of 14; over a period of three months or longer; and the defendant must have resided with or had "recurring access" to the child. (See *People v. Mejia* (2007) 155 Cal.App.4th 86, 96 (*Mejia*).)

1. Jane Doe 2 (Count 3)

We reject Gonzalez's argument that there is insufficient evidence that he perpetrated at least three lewd or lascivious acts against Jane Doe 2. Gonzalez asserts that Jane Doe 2's testimony was "incredibly vague" and the "jury could only speculate that there were more than three occasions [of molestation]." Although she acknowledged some uncertainty and her testimony varied in its details, Jane Doe 2 did not deny that

Gonzales touched her. On direct examination, she testified that Gonzalez touched her more than five times and she confirmed on redirect examination that Gonzalez touched her more than three times. A "reviewing court does not perform the function of reweighing the evidence; instead, the court must draw all inferences in support of the verdict that can reasonably be deduced from the evidence." (*People v. Culver* (1973) 10 Cal.3d 542, 548.) Jane Doe 2's testimony about the number of lewd acts Gonzalez committed is substantial evidence of the requisite element in section 288.5.

However, we agree with Gonzalez that there is insufficient evidence that the acts of abuse occurred over a period of three months or longer. Gonzalez argues that "there was absolutely no evidence to show that the events occurred over a time span not less than three months." The Attorney General concedes that Jane Doe 2 did not specify the period in which the molestations occurred "other than that one incident occurred in third grade."[11] The Attorney General nevertheless urges this court to hold that "a juror could reasonably infer from [Jane Doe 2's] testimony that she had been molested at least eight times and, since she did not state that the molestations occurred over a defined period, that the molestations occurred over the entire school year." In the alternative, the Attorney General argues that, should this court find insufficient evidence of a violation of section 288.5, we should reduce Gonzalez's conviction to the lesser offense of section 288, subdivision (a)—an issue that Gonzalez does not address.

"[T]he prosecution need not prove the exact dates of the predicate sexual offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least three months elapsed between the first and last sexual acts. Generic testimony is certainly capable of satisfying that requirement, as the

[11] Count 3 charged Gonzalez with committing continuous sexual abuse "[o]n or between June 21, 2013 through June 3, 2015." In her closing argument, the prosecutor stated only that Jane Doe 2 "told us [the touching] happened between 2013, 2015." Jane Doe 2's testimony about the molestation, however, was limited to the 2014-2015 school year.

hypothetical examples listed by the Supreme Court in [*People v. Jones* (1990) 51 Cal.3d 294, 316 (*Jones*)] illustrate." (*Mejia*, *supra*, 155 Cal.App.4th at p. 97.) However, "while generic testimony may suffice, it cannot be so vague that the trier of fact can only speculate as to whether the statutory elements have been satisfied." (*Ibid*.)

In *Jones*, the California Supreme Court said the following about the sufficiency of generic testimony: "The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g. lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us') to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Jones*, *supra*, 51 Cal.3d at p. 316.)

We agree with Gonzalez that there was insufficient evidence that he perpetrated lewd acts against Jane Doe 2 over at least three months. Although Jane Doe 2 testified that she was in third grade when "something [she] didn't like happened at the house," and she described two incidents that she said occurred when she was in the third grade, she did not say when the acts of molestation—ranging in number from more than three to perhaps nine—began or ended during the school year. She also did not describe the frequency or pattern of the molestation, or state that it continued through June 2015, when the allegations against Gonzalez came to light.

The Attorney General urges us to use the indefinite nature of Jane Doe 2's testimony about the timing of the molestation to presume that the acts occurred throughout her third-grade school year. We may not, however, "go beyond inference and into the realm of speculation in order to find support for a judgment. A finding which is merely the product of conjecture and surmise may not be affirmed. Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. Indeed, a trier of fact may rely on inferences to support a conviction only if those inferences are of such substantiality that a reasonable trier of fact could determine beyond a reasonable doubt that the inferred facts are true." (*People v. Franklin* (2016) 248 Cal.App.4th 938, 947-948, citations and punctuation omitted.)

The evidentiary deficiency here is analogous to that in *Mejia*. There, the defendant was charged with committing continuous sexual abuse "on or between June 1, 2004 and September 17, 2004." (*Mejia*, *supra*, 155 Cal.App.4th at p. 93, internal quotation marks omitted.) The evidence showed the victim was first abused at some unspecified time in June 2004, and it continued every month through September, and that she turned 14 on September 18, 2004. (*Id*. at pp. 94-95.) Because "the only reasonable inference permitted by the evidence was that defendant's abuse began sometime in June and continued to some date in September—but the jury could only speculate that the first incident occurred early enough in June to satisfy the 90-day requirement expiring on September 17, 2004," the court held the evidence was insufficient to support the conviction. (*Id*. at p. 95.)

Moreover, Jane Doe 2's testimony about the number, frequency, and timing of the molestation is unlike the examples noted in *Jones* (i.e., "twice a month" or "every time we went camping"; "the summer before my fourth grade" or "during each Sunday morning after he came to live with us"), and different than the evidence the Supreme

Court held was substantial. The evidence in *Jones* demonstrated that the "[d]efendant first molested [the victim] about one month after [the victim] came to live with him. The molestations recurred once or twice a month during the entire period in which [the victim] lived with defendant (August 1983 through June 1985), although there may have been some 'breaks' in the period when no molestation occurred for more than a month. Thus, [the victim] believed that no such acts were committed during March and April 1984." (*Jones*, *supra*, 51 Cal.3d at p. 302.) The victim "was able to recall being molested . . . at *five different locations* . . . although he had difficulty specifying the exact dates or additional details to further identify these acts." (*Ibid*.) And the "last such molestation occurred only a few days before defendant's arrest." (*Id*. at p. 303.) The Court concluded that the victim's testimony "was substantial evidence of frequent (once or twice each month) molestations by defendant, at five separate locations, consisting exclusively of oral copulation. Moreover, [the victim's] testimony supported the finding that these molestations occurred during the periods specified in [the] four counts of the information, and well within the limitation period." (*Id*. at p. 322.) Here, as in *Mejia*, and by contrast to *Jones*, there was no substantial evidence from which the jury could reasonably infer that Gonzalez perpetrated the lewd acts on Jane Doe 2 over at least three months.

Although we find insufficient evidence of a violation of section 288.5, we do not reverse the conviction on count 3 but instead modify it to a violation of section 288, subdivision (a).[12] Section 1260 authorizes this court to "modify a judgment or order appealed from, or reduce the degree of the offense. . . ." (§ 1260; see also *People v.*

[12] Section 288, subdivision (a) states: "Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

Navarro (2007) 40 Cal.4th 668, 679 (*Navarro*).) An offense is necessarily included in another if either the statutory elements of the greater offense or the facts alleged in the accusatory pleading include all of the elements of the lesser offense, so that the greater offense cannot be committed without also committing the lesser. (*People v. Bailey* (2012) 54 Cal.4th 740, 748; see also *People v. Smith* (2013) 57 Cal.4th 232, 242-244.)

Here, count 3 charged Gonzalez with "unlawfully engag[ing] in three and more acts of 'substantial sexual conduct', as defined in Penal Code Section 1203.066(b), and three and more lewd and lascivious acts, as defined in Penal Code Section 288, with Jane Doe #2, a child under the age of 14 years. . . ." (Some capitalization omitted.) The trial court instructed the jury both on the greater offense of continuous sexual abuse of a child—which included the definition of lewd or lascivious conduct—and on the lesser offense of lewd or lascivious act on a child under the age of 14. In addition, the prosecutor argued to the jury that Gonzalez engaged in lewd acts with sexual intent against Jane Doe 2. A modification to a lesser offense in these circumstances is permissible because it does not involve "finding or changing any fact, but . . . applying the established law to the existing facts as found by the jury." (*Navarro*, *supra*, 40 Cal.4th at p. 679, citation and internal quotation marks omitted.)

Jane Doe 2 testified that Gonzalez touched her genitalia with his hand several times, touched her chest one time, and put his penis in her buttocks during the two-year period alleged in count 3. In addition, Jane Doe 5 testified that she saw Gonzalez touch Jane Doe 2 on her buttocks over her clothing. Based on this evidence, we conclude that the prosecution demonstrated beyond a reasonable doubt that Gonzalez committed lewd and lascivious acts on Jane Doe 2 in violation of section 288, subdivision (a). Accordingly, we modify the judgment on count 3 to reflect a violation of section 288, subdivision (a). (See *People v. Enriquez* (1967) 65 Cal.2d 746, 749.) We next address the sentencing implications of this conclusion.

This modification of count 3 to a conviction of section 288, subdivision (a) does not affect the jury's finding on the multiple-victim allegation for count 3 (§ 667.61, subds. (b) & (e)(4)). Under section 667.61, subdivision (j)(2), a violation of section 288, subdivision (a) requires a sentence of 25 years to life, which is the same sentence Gonzalez received originally on this count for the conviction of section 288.5. However, the trial court was required to impose a consecutive sentence for the conviction of section 288.5 because the crimes involved separate victims (§ 667.6, subd. (d)). A conviction of section 288, subdivision (a) with a multiple-victim enhancement, by contrast, does not require a consecutive sentence; instead the trial court has the discretion to impose a concurrent sentence, as the trial court did for count 10. (§ 669; *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524.) Because it is for the trial court to exercise in the first instance its discretion whether to impose a consecutive or concurrent sentence on the modified count 3 (Cal. Rules of Court, rule 4.425), we remand the case to the trial court for resentencing on all counts. (See *Navarro*, *supra*, 40 Cal.4th at p. 681 [stating remand "for a full resentencing as to all counts is appropriate" when modifying a verdict to reflect a conviction of a lesser included offense].)

2. Jane Doe 3 (Count 4)

Gonzalez similarly argues that the evidence regarding the number of times Jane Doe 3 was touched by him was vague and insufficient to prove that at least three separate incidents occurred and that the last act occurred at least three months after the first.

Although Jane Doe 3 testified at trial that Gonzalez never touched her in a sexual way, Jane Doe 3's mother testified about Jane Doe 3's 2014 report that Gonzalez took her into her bedroom to "pretend that they were boyfriend and girlfriend" and touched her breasts, legs, vagina, and buttocks. In addition, prior to trial, Jane Doe 3 told the forensic interviewer about multiple molestations, including Gonzalez touching with his hands and genitalia her legs, feet, genitalia, and buttocks. Jane Doe 4 and Jane Doe 6 also saw Gonzalez touch Jane Doe 3 several times.

"Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) The evidence demonstrated clearly and substantially that Gonzalez committed at least three acts of lewd or lascivious conduct on Jane Doe 3. Thus, we conclude the evidence was sufficient to prove that element of section 288.5, subdivision (a).

We also reject Gonzalez's argument that the evidence failed to prove the requisite three-or-more-month duration for the lewd acts. Jane Doe 3 lived in Gonzalez's house from 2008 to 2015. She told her mother that Gonzalez touched her in 2014, but not 2015. In her forensic interview, Jane Doe 3 twice said that Gonzalez "always takes [her] to his room." She also said, "He, he always makes nasty. . . ." Although Jane Doe 3 indicated that she did not remember when Gonzalez first touched her, and she said, "I don't remember nothing" when asked to describe the last time Gonzalez touched her, she described multiple incidents of molestation during her interview and said that the molestations occurred on "different days" when she was "six . . . or five, I don't remember." In addition, Jane Doe 3 said some acts occurred when she was in kindergarten "and, too, I was in first grade."

Although Jane Doe 3 did not precisely state when the molestations began and ended, viewing the entire record in the light most favorable to the judgment, we conclude that the jury could reasonably infer from the evidence—and particularly from Jane Doe 3's statements that some acts occurred when she was in kindergarten and in first grade—that at least three months elapsed between the first and last lewd act perpetrated by Gonzalez. Further, as previously noted, Jane Doe 3 lived with Gonzalez for 7 years. By contrast, Jane Doe 2 never lived with Gonzalez.

In sum, Jane Doe 3's statements and other pertinent testimony provided reasonable, credible, and solid evidence—describing with sufficient specificity the nature

of Gonzalez's acts, the quantity and frequency of his acts, and the general time period in which his acts occurred—that the lewd acts occurred over a period of at least three months. "Additional details regarding the time, place or circumstance of the various assaults . . . are not essential to sustain a conviction." (*Jones*, *supra*, 51 Cal.3d at p. 316.) We affirm Gonzalez's conviction on count 4.

B. *Child Sexual Abuse Accommodation Syndrome*

Gonzalez contends that Dr. Urquiza's expert testimony on child sexual abuse accommodation syndrome should not have been admitted for any purpose because it is unreliable; that is, "by its very nature, it will always support the conclusion that the abuse actually occurred." Gonzalez acknowledges that his trial counsel did not object to the admission of CSAAS evidence but claims that an objection was not required to preserve his argument for review because it would have been futile given the California precedent permitting CSAAS evidence. The Attorney General counters that stare decisis principles preclude acceptance of Gonzalez's challenge to the admissibility of CSAAS evidence.[13] Gonzalez also argues that the trial court erred when it instructed the jury with CALCRIM No. 1193, which allowed jurors to consider the child sexual abuse accommodation syndrome testimony in evaluating the credibility of the complaining witnesses.

1. The Admissibility of CSAAS Testimony

Expert witness testimony is admissible if it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the

[13] The Attorney General also asserts that trial counsel's failure to object, either under Evidence Code section 352 or on the ground that Dr. Urquiza's testimony went beyond the scope of that which is permissible for CSAAS evidence, precludes appellate review of any argument challenging the particular testimony in this case. We understand Gonzalez's argument as a general attack on the admissibility of CSAAS evidence, not a challenge to particular testimony of Dr. Urquiza. We agree with Gonzalez that any objection at trial would have been futile based on the precedent we discuss, and we excuse his lack of objection for purpose of appellate review. (*People v. Brooks* (2017) 3 Cal.5th 1, 92.)

trier of fact" and is "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. . . ." (Evid. Code, § 801, subds. (a), (b).) We review a trial court's decision to admit expert testimony for abuse of discretion. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 (*McAlpin*).)

As Gonzalez acknowledges, child sexual abuse accommodation syndrome evidence is routinely admitted in sexual abuse cases, and California courts have long held such evidence admissible to disabuse jurors of common misconceptions about sexually abused children. (See, e.g., *McAlpin*, *supra*, 53 Cal.3d at pp. 1300-1301; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745 (*Patino*); *People v. Housley* (1992) 6 Cal.App.4th 947, 955-956; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449-450; *People v. Stark* (1989) 213 Cal.App.3d 107, 116-117.)

In *People v. Perez* (2010) 182 Cal.App.4th 231, this court rejected a challenge to the admissibility of CSAAS evidence similar to that Gonzalez raises. This court concluded in *Perez* that there was no reason to depart from precedent and that the court was bound by the California Supreme Court's reasoning on the issue. (*Perez*, *supra*, 182 Cal.App.4th at p. 245.)

In light of these prior holdings, we decline to rule that the entire body of child sexual abuse accommodation syndrome evidence is inadmissible in every case. Our Supreme Court has recognized that such evidence may be relevant, useful, and admissible. (*McAlpin*, *supra*, 53 Cal.3d at pp. 1300-1301; *People v. Brown* (2004) 33 Cal.4th 892, 905-906.) As an intermediate appellate court, we are required to follow that precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

"A trial court's exercise of discretion in admitting or excluding evidence . . . will not be disturbed except on a showing the trial court exercised its discretion in an

arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) The trial court did not abuse its discretion when it ruled that, under existing law, expert testimony limited to a description of CSAAS and its criteria was admissible. The prosecutor's in limine motion maintained that the testimony was proffered to " 'disabuse the jury of some widely held misconceptions' of sexually abuse[d] children and to assist the jury in evaluating the testimony of the complaining witness[es]." At a hearing on the in limine motion, defense counsel conceded that the proffered testimony was admissible, and acknowledged that he would object if the testimony exceeded the bounds of the proffer. The CSAAS testimony was relevant to multiple aspects of the testimony of the Jane Does, including that some delayed disclosing Gonzalez's actions to other adults because they were afraid. We conclude that the trial court correctly admitted the proffered expert testimony based on precedent (*Patino*, *supra*, 26 Cal.App.4th at pp. 1744-1745), and we reject Gonzalez's claim of error.

2. CALCRIM No. 1193

Gonzalez acknowledges that he did not object to or request a modification of CALCRIM No. 1193 at trial. Nevertheless, section 1259 allows appellate review of instructional error claims that affect the defendant's substantial rights. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1074, fn. 7.) Accordingly, we consider the merits of Gonzalez's challenge to the instruction.

In reviewing the purportedly erroneous instruction, "the relevant inquiry is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violated the Constitution. In addition, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." (*People v. Covarrubias* (2016) 1 Cal.5th 838, 915, internal citations and punctuation omitted.) When conducting our inquiry, we examine the challenged jury

instruction in the context of all instructions, not in isolation. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

The trial court instructed the jury with CALCRIM No. 1193 as follows: "You have heard testimony from Dr. Anthony Urquiza regarding child sexual abuse accommodation syndrome. Dr. Urquiza's testimony about the child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not Jane Doe Number One, Number Two, Number Three, Number Four, Number Five, Number Six or Number Seven's conduct was not inconsistent with the conduct of someone who has been molested and in evaluating the believability of their testimony."

Gonzalez challenges the final phrase of the instruction concerning the believability of the victims' testimony. He argues that the language improperly allowed jurors to use the expert testimony to evaluate the victims' credibility and consider the expert testimony as supportive of the truth of the charged crimes. We are not persuaded.

Gonzalez's claim that it is "almost certain the jurors would utilize the CSAAS testimony in one way—as supportive of the truth of the charges made against the defendant"—is belied by the language of the instruction. The instruction told the jury that the expert testimony "is not evidence that the defendant committed any of the crimes charged against him" and could be used only for the stated limited purposes. Moreover, Dr. Urquiza testified that he did not evaluate the victims and that the syndrome was not a diagnostic tool to determine if a child had been abused. Although the assessment of an alleged sexual abuse victim's "believability" may assist the jury in determining whether to credit the victim's testimony that the abuse occurred, the same can be said of any evidence that is admitted as relevant to a witness's credibility. As CSAAS testimony can properly be used to determine whether a victim's conduct was not inconsistent with that of a person who has been molested, it may properly be used to evaluate a victim's credibility. (See *People v. Gonzales* (2017) 16 Cal.App.5th 494, 503-504.) It is not

reasonably likely that the jurors concluded from the instruction that they could properly use the expert testimony as affirmative proof supporting the truth of the charges or to lessen the prosecution's burden to prove Gonzalez's guilt beyond a reasonable doubt. We conclude that the trial court properly instructed the jury with CALCRIM No. 1193, and Gonzalez's right to due process was not violated.

III. DISPOSITION

The judgment of conviction is affirmed except as to count 3, which we modify to reflect a conviction under Penal Code section 288, subdivision (a). The matter is remanded to the trial court for resentencing on count 3, as modified, and on all other counts. The trial court is ordered to resentence Gonzalez for his conviction on count 3, as modified, and for his convictions on all other counts, as previously entered, and to prepare an amended abstract of judgment. As modified, the judgment is affirmed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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GROVER, J.

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